

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GWEN GREEN and DEPARTMENT OF THE TREASURY,
BUREAU OF ENGRAVING & PRINTING, Fort Worth, TX

*Docket No. 03-1060: Submitted on the Record;
Issued July 16, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant established that she sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for review of the written record.

On January 15, 2002 appellant, then a 49-year-old plate printer, filed a notice of occupational disease (Form CA-2) alleging that on October 23, 2000 a knot formed on the top of her left foot which she attributed to being required to wear steel-toed shoes. Appellant indicated that she worked seven days a week for twelve hours and sometimes sixteen hours per day causing her shoes to wear out faster than she could get them replaced. She required specially made shoes that needed a new bottom and could not be repaired as the company that she had previously used no longer provided that service. As a result, she was unable to obtain the special shoes between 1987 and 1994. Appellant stated that she changed job locations in 1990 and again tried to have her special shoes repaired, noting the second pair fit incorrectly and could not be fixed. She stated that her feet hurt such that she had to soak them often.

In a letter dated February 12, 2002, the Office advised appellant of the additional factual and medical evidence needed to establish her claim. Appellant was advised to submit a rationalized statement from her physician addressing the causal relationship between her claimed injury and factors of her federal employment. Appellant was allotted 30 days to submit the requested evidence.

Appellant underwent magnetic resonance imaging (MRI) scans on December 12, 2001 and January 18, 2002. Both MRI scans revealed a mass on her left foot, which was suggestive of a Morton's neuroma, a soft tissue mass probably containing fibrous tissue, or a giant cell tumor of the tendon sheath.

In a December 17, 2001 report, Dr. Marvin Van Hal, a Board-certified orthopedic surgeon, indicated that appellant was seen in follow up of her MRI scan of the left foot. He

noted that he did not have the report; however, there was a significant mass noted and he planned to review this with the radiologist.

After reviewing appellant's January 18, 2002 MRI scan, Dr. Van Hal reported on January 21, 2002 that there were a lot of unknowns, particularly with respect to the type of tumor and whether it could be removed without some type of neurovascular compromise to appellant's toes. Dr. Van Hal further noted that the bone was definitely atrophied at the second metatarsal head area.

In a February 4, 2002 report, Dr. Van Hal indicated that appellant was seen in follow up for her left foot mass. He noted that it encased the metatarsal as well as the neurovascular area and opined that taking it out via a dorsal incision did not appear likely as there were reconstruction issues as well. Further, Dr. Van Hal opined that it appeared to be a giant cell type of tumor or a Morton's neuroma.

By decision dated March 19, 2002, the Office denied appellant's claim on the grounds that she failed to establish that her condition was caused or aggravated by her federal employment.

On January 3, 2003 appellant requested a review of the written record. Appellant also submitted a March 4, 2002 report from Dr. Van Hal.

In a decision dated March 3, 2003, the Office denied appellant's request for a review of the written record, noting that a request for an oral hearing or a review of the written record must be made within 30 days after the issuance of the final decision by the Office and as appellant's request was not received until January 3, 2003, it was not filed within 30 days of the March 19, 2002 decision. Furthermore, the Office considered appellant's request and further denied it for the reason that the case could be equally well addressed by requesting reconsideration and submitting additional evidence regarding causal relationship.

The Board finds that appellant failed to establish that she sustained an injury in the performance of duty.

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.¹ The medical opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.²

¹ *Solomon Polen*, 51 ECAB 341, 343-44 (2000).

² *Id.*

Appellant submitted several reports from Dr. Van Hal. In his December 17, 2001 report, he was not sure of appellant's condition. Dr. Van Hal opined that, if it was a solid tumor, they would have to reconsider. In a January 21, 2001 report, he opined that there were a lot of unknowns and discussed a tumor. In Dr. Van Hal's February 4, 2002 report, he indicated that appellant had either a giant cell type of tumor or a Morton's neuroma. None of the aforementioned reports attributed appellant's foot condition to her federal employment.

The record also includes a March 4, 2002 report from Dr. Van Hal wherein he indicated that appellant had undergone foot surgery. Dr. Van Hal noted that he agreed with appellant that her "foot was exacerbated by the wearing of steel-toed shoes and foot ware in general." He further stated that "the tumor itself [was] not related at all to [appellant's] work" and the "irritation over small bunionette could be related to the shoe wear." The Board finds this report to be speculative and is not sufficient to support that appellant's condition was related to her federal employment.³ Moreover, Dr. Van Hal did not explain how appellant's wearing of steel-toed shoes exacerbated her foot. As such, his opinion is entitled to little probative value and insufficient to meet appellant's burden of proof.⁴

Appellant has not submitted sufficient rationalized medical evidence to establish that she sustained a foot condition causally related to factors of her employment. As she has not submitted the requisite medical evidence needed to establish her claim, she has failed to meet her burden of proof.⁵ For the above-noted reasons, appellant has not established that she sustained an injury in the performance of duty.

The Board further finds that the Office properly denied appellant's request for review of the written record.

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which review is sought. A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision for which a hearing is sought.⁶ However, the Office has discretion to grant or deny a request that was made after this 30-day period.⁷ In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.⁸

³ The Board has held that an opinion which is speculative in nature has limited probative value in determining the issue of causal relationship. *Arthur P. Vliet*, 31 ECAB 366 (1979).

⁴ *Carolyn F. Allen*, 47 ECAB 240 (1995).

⁵ Appellant provided additional evidence on appeal. The Board, however, cannot consider new evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

⁶ 20 C.F.R. § 10.616(a) (1999).

⁷ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁸ *Rudolph Bermann*, 26 ECAB 354 (1975).

Appellant's request for review of the written record was dated January 3, 2003, which is more than 30 days after the Office's March 19, 2002 decision. As such, appellant is not entitled to a review of the written record as a matter of right. Moreover, the Office considered whether to grant a discretionary review, and correctly advised appellant that the issue could equally well be addressed by requesting reconsideration.⁹ Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for review of the written record.

The decisions of the Office of Workers' Compensation Programs dated March 3, 2003 and March 19, 2002 are hereby affirmed.

Dated, Washington, DC
July 16, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁹ The Board has held that a denial of review on this basis is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).